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No. 01-698

IN THE
Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

CALIFORNIA FEDERAL BANK, FSB,

Respondent.

On Cross-Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Based upon this Court's decision in *United States v. Winstar Corp.*, 518 U.S. 839 (1996), both courts below found that the undisputed facts established that the government had entered into valid and binding contracts with respondent California Federal Bank, FSB. The sole question presented by the government's cross-petition is whether this Court should revisit those concurring determinations.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

All of the parties to the proceedings in the court of appeals are listed in the caption of this petition. California Federal Bank, FSB is a wholly owned subsidiary of Golden State Holdings, Inc., which in turn is a wholly owned subsidiary of Golden State Bancorp, Inc.

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BRIEF FOR RESPONDENT IN OPPOSITION

Respondent California Federal Bank, FSB ("CalFed") respectfully submits this brief in opposition to the government's conditional cross-petition for a writ of certiorari.[1]

OPINIONS BELOW

The opinion of the court of appeals (01-592 Pet. App. 1a-15a) is reported at 245 F.3d 1342 (2001). The opinion of the Court of Federal Claims regarding liability (01-592 Pet. App. 48a-101a) is reported at 39 Fed. Cl. 753 (1997), and the opinion of the Court of Federal Claims regarding remedies (01-592 Pet. App. 17a-47a) is reported at 43 Fed. Cl. 445 (1999).

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[1] CalFed's separate petition for a writ of certiorari is pending in this Court as No. 01-592.

JURISDICTION

The judgment of the court of appeals was entered on April 3, 2001. A timely petition for rehearing was denied on July 10, 2001. 01-592 Pet. App. 16a. CalFed's petition for a writ of certiorari in No. 01-592 was docketed on October 9, 2001. The government's conditional cross-petition for a writ of certiorari in No. 01-698 was docketed on November 19, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

On summary judgment, the Court of Federal Claims found that the undisputed evidence in this case established that the government had entered into a *Winstar*-type contract with CalFed to allow CalFed to include goodwill resulting from three supervisory mergers as regulatory capital for specified periods. *See generally United States v. Winstar Corp.*, 518 U.S. 839 (1996) (holding that United States is liable for breach of goodwill contracts). The Federal Circuit, which reviewed the trial court's liability determination *de novo*, affirmed.

I. The Savings and Loan Crisis and FIRREA

During the early 1980s, in the midst of the worst savings and loan crisis since the Great Depression, the federal government found itself facing deposit insurance liabilities that threatened to bankrupt the government's insurance fund. *Winstar*, 518 U.S. at 846-47. As a means of avoiding insurance liability, and as an alternative to government takeovers of failing thrifts, the government encouraged healthier thrifts, such as CalFed, to take over the failing thrifts through so-called "supervisory mergers." *Id.* at 847.

As this Court stated in *Winstar*, "the principal inducement for these supervisory mergers was an understanding that the acquisitions would be subject to a particular accounting treatment that would help the acquiring institutions meet their reserve capital requirements

imposed by federal regulations." *Id.* at 848. This special regulatory accounting treatment was essential because it permitted the acquiring institutions to count the liabilities of the acquired failing thrifts as "supervisory goodwill," *i.e.*, as an asset for purposes of regulatory capital requirements. *Id.* at 849-50; *id.* at 921 (Scalia, J., concurring in judgment) (goodwill promises were the "*sine qua non*" of the supervisory mergers). This use of supervisory goodwill allowed the acquiring thrifts to meet their regulatory obligations and "to leverage more loans (and [they] hoped, make more profits)." *Id.* at 851. The acquiring thrifts were allowed to amortize the supervisory goodwill obtained in the acquisitions over extended periods (up to 40 years), which further allowed the thrifts to satisfy regulatory capital requirements. *Id.* at 852-53.

The federal thrift regulators approved hundreds of supervisory mergers in the 1980s, *id.* at 847 n.3, including three with CalFed that are at issue in this case. As detailed below, and as the courts below held, in each of these transactions the government promised CalFed that it could amortize supervisory goodwill over periods ranging from 35 to 40 years and could include the unamortized goodwill in calculating regulatory capital.

In 1989, Congress passed the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA"), Pub. L. No. 101-73, 103 Stat. 183, which made enormous changes in the structure of federal thrift regulation. *Winstar*, 518 U.S. at 856. Most important for present purposes, FIRREA mandated the promulgation of regulations requiring thrifts to maintain levels of regulatory capital that could not include supervisory goodwill (either immediately or after a 5-year phase-out). *Id.* at 857. In effect, the FIRREA-mandated regulations eliminated the favorable treatment of goodwill promised by the government as the principal inducement to hundreds of thrifts involved in supervisory mergers.

In *Winstar*, which involved three "test" cases, this Court held that the new regulatory capital requirements imposed by FIRREA breached the goodwill contracts arising out of the supervisory mergers. 518 U.S. at 870. Rejecting any notion that the government was entitled to "special rules" when contracting, the Court reaffirmed "the general principle that, 'when the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals.'" *Id.* at 895 (citation omitted). The Court explained that the goodwill contracts, which were based upon the acquiring thrifts' assumption of the failing thrifts' liabilities, involved the transfer of valuable consideration designed to prevent or mitigate an impending crisis in the thrift industry and thereby save the government's insurance fund from financial collapse. *Id.* at 886-87, 869, 906, 908; *id.* at 918 (Breyer, J., concurring); *id.* at 919 (Scalia, J., concurring in judgment). Accordingly, the Court affirmed the Federal Circuit's finding of liability and remanded the cases for a determination of remedies. *Id.* at 910.

II. The CalFed Transactions

In the early 1980s, CalFed entered into supervisory merger agreements with the government in connection with three separate transactions: the "Southeast" transaction, the "Brentwood" transaction, and the "Family" transaction. In each instance, the government's goodwill promises induced CalFed, which "was a relatively healthy thrift" (01-592 Pet. App. 18a), to acquire thrifts on the verge of failure. The government now concedes that the Southeast transaction resulted in a goodwill contract that the government breached, Pet. 4, but nonetheless asserts that no contract arose from the Brentwood and Family transactions. Those two transactions were identical to the Southeast transaction in all material respects, except that neither had an "Assistance Agreement" because, unlike in Southeast, the govern-

ment provided no financial assistance as part of the transactions.

A. Southeast

In late 1981, CalFed agreed to merge with three Georgia thrifts and one Florida thrift (collectively, "the Southeast institutions"). The merger agreement was conditioned on the Federal Savings and Loan Insurance Corporation (FSLIC) and the Federal Home Loan Bank Board (FHLBB) granting "regulatory forbearances including net worth compliance waivers satisfactory to California Federal" and "an indemnity agreement for unknown material events and other contingencies." A5002175.[2]

CalFed proceeded to negotiate with the government, offering to acquire the Southeast institutions in exchange for $9 million in assistance, a forbearance by the FHLBB and the FSLIC from "any action against California Federal . . . for failure to comply with reserve and net worth requirements and scheduled item limitations insofar as such noncompliance is due to the acquisition of" the Southeast institutions, and the amortization over thirty to forty years of any goodwill resulting from the acquisition, as well as the right to include the unamortized goodwill in regulatory capital. A5002171-73.

The FSLIC accepted CalFed's offer. In February 1982, the FSLIC and CalFed entered into an "Assistance Agreement" providing that in partial exchange for assuming the Southeast institutions' $305.67 million in net liabilities, CalFed would receive a $9 million capital credit from the FSLIC. 01-592 Pet. App. 2a. CalFed also received a forbearance letter permitting the excess liabilities to be recorded as supervisory goodwill to be includable as regulatory capital and amortized over 35

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[2] Unless otherwise indicated, all record references are to the Joint Appendix filed with the Federal Circuit.

to 40 years. *Id.* The Assistance Agreement included a provision incorporating the forbearance letter. *Id.* at 2a-3a.

B. Brentwood

In 1982, CalFed agreed to acquire the Brentwood Savings and Loan Association and assume $314.63 million in net liabilities from the failing thrift. 01-592 Pet. App. 3a. As in the Southeast transaction, CalFed's agreement with Brentwood was conditioned on it securing from the FSLIC and the FHLBB certain regulatory forbearances, as well as an agreement to include the supervisory goodwill resulting from the acquisition in calculating regulatory capital. A5002254-64; A5002329-31.

Once it had entered into a conditional agreement with the thrift, CalFed, as it had in the Southeast transaction, proceeded to negotiate with the government. CalFed proposed to acquire Brentwood in exchange for receiving the same sort of forbearances and waivers the government had agreed to in the Southeast transaction. A5002332-33. In particular, CalFed requested the FHLBB's approval of "the amortization [over 35 years] of any goodwill created." A5002325; 01-592 Pet. App. 3a. CalFed noted that its acquisition of the failing thrift would "avoid great expenditures of resources of the FSLIC" and emphasized that "[t]he types of waivers and forbearance requested are important to CalFed in providing an adequate basis for CalFed's management and directors to finalize the proposed transaction." A5002331, 5002334.

The government concluded that "FSLIC assistance" would be "necessary" without the CalFed merger. A2000242, A200249. Consequently, on September 30, 1982, the FHLBB approved the Brentwood acquisition, recommending in an internal memorandum that amortization of supervisory goodwill "be granted" and stating that the "association should be allowed to use regulatory

accounting procedures in reports to the Board." A5002595. The next day, the FHLBB issued a forbearance letter stipulating, per CalFed's request, that the resulting association could amortize over 35 years any goodwill created by the acquisition and count that goodwill for regulatory capital purposes. 01-592 Pet. App. 3a. The FHLBB also agreed not to enforce its net worth requirements for a period of five years to the extent that CalFed's failure to meet the requirements was attributable to the assets or liabilities acquired from Brentwood. *Id.*

Unlike CalFed's offer in the Southeast transaction, its Brentwood offer did not request a cash payment. Consequently, the Brentwood transaction did not involve an Assistance Agreement. 01-592 Pet. App. 3a.

C. Family

The next year, 1983, CalFed entered into a contract with Family Savings and Loan Association to acquire that Nevada thrift. As in the Southeast and Brentwood transactions, CalFed conditioned the merger agreement on the FHLBB's approving the amortization over 40 years of any goodwill created, and on the government's granting certain regulatory forbearances. A52002340-44.

Just as in the Southeast and Brentwood transactions, CalFed then submitted its merger application to the government, again conditioning its proposal to acquire Family upon the regulators' approval of the now-familiar forbearances and waivers, including the right to amortize the goodwill produced by the acquisitions over 40 years and to include the unamortized goodwill in regulatory capital. 01-592 Pet. App. 3a. The FHLBB characterized CalFed's submission as an "offer submitted" and a "proposal . . . acceptable to the FSLIC" that would "present the lowest expense to the Corporation." A5002557. In a resolution dated January 5, 1983 and a forbearance letter of the same date, the government ac-

cepted CalFed's offer. A5002559-60, A5002624-26; 01-592 Pet. App. 3a. CalFed assumed $17.74 million in net liabilities through the acquisition. 01-592 Pet. App. 3a.

As in the Brentwood transaction, because CalFed did not request a cash payment, its agreement with the government did not involve an Assistance Agreement. 01-592 Pet. App. 3a.

III. Proceedings Below

Relying on *Winstar* and black-letter contract law, then-Chief Judge Smith of the Court of Federal Claims granted summary judgment in favor of CalFed as to the issue of liability in all three transactions. 01-592 Pet. App. 101a. He began by observing that "[b]ecause the dollars at stake appear to be so large the government has raised legal and factual arguments that have little or no basis in law, fact or logic," and specifically noted the government's efforts "to relitigate the core *Winstar* liability issues in every case." *Id.* at 49a.

After reviewing the extensive documentary record surrounding each of the three CalFed transactions, Judge Smith held that in each case, the government made binding contractual promises regarding the use of goodwill in order to induce CalFed into acquiring the net liabilities of the failing thrifts. He expressly rejected the government's contention that an "assistance agreement" is a necessary element of a *Winstar*-type contract: "[T]he factual record[ ] . . . show[s] intent to contract with the government for specified treatment of goodwill, and documents such as correspondence, memoranda, and Bank Board resolutions confirm that intent . . . . [T]he absence of an [Assistance Agreement]

should be irrelevant to the finding that a contract existed." 01-592 Pet. App. 87a.[3]

The court of appeals, which reviewed the question of contract formation *de novo*, affirmed Judge Smith's liability determinations. 01-592 Pet. App. 5a-9a. Citing the "contemporaneous documents and surrounding circumstances that included forbearance letters," the Federal Circuit held that the government entered into legally binding goodwill contracts in each of the three CalFed transactions. *Id.* at 5a. The court explained that the absence of an Assistance Agreement in the Brentwood and Family transactions "is not dispositive of the issue of contract formation between the government and CalFed," and agreed with the lower court that "the factual record" surrounding the transactions established the existence of legally binding contracts. *Id.* at 6a.

The court of appeals' ruling, like Judge Smith's, rested on a close review of the documentary evidence: "Based on all of the contemporaneous documents in each of the three transactions, the FHLBB and the FSLIC were contractually bound to recognize the supervisory goodwill and the amortization periods reflected in the forbearance letters." *Id.* The Federal Circuit concluded that "[i]t is clear from the documents" that the parties manifested an intent to enter into a legally binding contract, and further observed that "[t]he documentary evidence for both the Brentwood and Family transactions" was "precisely the type of evidence relied upon by the *Winstar* courts to establish the existence of contracts between acquiring thrifts and the government." *Id.* at 8a-9a. Consequently, "[j]ust as in *Winstar* . . . all

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[3] Following the grant of summary judgment as to liability, the remedies portion of CalFed's case was transferred to Judge Hodges for trial. The decisions of Judge Hodges and the Federal Circuit on remedies are the subject of CalFed's petition in No. 01-592. *See* note 6, *infra*.

of the necessary elements of contract formation are here, and the parties are bound by the terms of that contract." *Id.* at 7a.

ARGUMENT

The government's conditional cross-petition represents merely its most recent attempt to evade responsibility for the promises it made during the thrift crisis of the 1980s and subsequently repudiated. Rather than accept liability for breaching its contracts with CalFed, the government seeks to relitigate the same question decided against it in *Winstar* itself, which was faithfully followed by the lower courts in this case.

After an extensive review of the contemporaneous documentary record and the surrounding factual circumstances, the Court of Federal Claims and the United States Court of Appeals for the Federal Circuit both concluded that the government made contractual goodwill promises in exchange for CalFed's acquisition of Brentwood and Family. Further review of that determination, which is supported by the undisputed evidence in the summary judgment record, and necessarily follows from a straightforward application of this Court's decision in *Winstar*, is unwarranted.

I. The Government Has Offered No Reason For This Court To Revisit The Factual Findings Of Both Courts Below

The government invites this Court to undertake a third review of the documentary evidence surrounding the Brentwood and Family transactions, and render a decision reversing the finding of the two lower courts. The government does not argue that the courts below applied an improper legal standard, but rather contends that there is no "evidence of a mutual intent to contract," Pet. 19, and insists that "there was nothing present in the record that would permit . . . the conclusion that there were contracts." Pet. 23 (emphasis omitted). Indeed,

the government devotes several pages of its petition to a discussion of its interpretation of the record evidence and whether "the documents suggest[ ] an exchange of contractual commitments." Pet. 17; *see also* Pet. 16-19 (requesting this Court's review of, *inter alia*, various merger applications, correspondence between CalFed and Bank Board, resolutions adopted by Bank Board, forbearance letters, and internal CalFed documents).

The government thus asks this Court to undertake precisely the kind of case-specific factual review that this Court expressly *declined* to perform in *Winstar* itself. In *Winstar*, as here, the Federal Circuit had affirmed the trial court's summary judgments as to contract liability. *See* 64 F.3d 1531, 1540-44 (Fed. Cir. 1995) (en banc). While this Court granted the government's petition to consider (and, ultimately, reject) the availability of certain defenses asserted by the government, the Court left undisturbed the lower courts' determinations that the goodwill contracts at issue had been formed: *"[W]e are in no better position than the Federal Circuit and the Court of Federal Claims to evaluate the documentary records of the transactions at issue."* 518 U.S. at 860-61 (emphasis added). So, too, here. The government has not even attempted to explain why, in the circumstances of *this* case, this Court is in any better position than either court below to resolve the question whether the contemporaneous evidence establishes the existence of goodwill contracts. That is undoubtedly because, as in *Winstar* itself, the question of contract formation in this case reflects the application of settled legal principles to undisputed facts—an inadequate basis for plenary review by this Court. As the Court explained in *United States v. Johnston*, 268 U.S. 220, 227 (1925), "[w]e do not grant a certiorari to review evidence and discuss specific facts."

The *Winstar* Court's acceptance of the lower courts' determinations regarding contract formation was simply

a particularized application of the "two-court rule," which provides that when two lower courts agree on the facts, this Court will not conduct its own independent review of the evidentiary record absent extraordinary circumstances. *See generally* Stern et al., *Supreme Court Practice* § 4.14 at 189 (7th ed. 1993). Indeed, the Court has made "repeated pronouncements that it 'cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.'" *Berenyi v. District Director*, 385 U.S. 630, 635 (1967) (quoting *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949)). *See also Exxon Co. v. Sofec, Inc.*, 517 U.S. 830, 840-41 (1996) (declining to reconsider factual conclusion of lower courts when petitioner failed to make an "obvious and exceptional showing of error") (citation omitted); *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987) (when "both courts below hav[e] agreed on the facts, we are not inclined to examine the record for ourselves absent some extraordinary reason for undertaking this task"); *United States v. Doe*, 465 U.S. 605, 614 (1984) ("Traditionally, we . . . have been reluctant to disturb findings of fact in which two courts below have concurred").

The two-court rule is an insurmountable obstacle to the government's request that this Court re-examine the factual findings in which both lower courts have concurred. A party seeking an exception to the two-court rule bears a "heavy burden," *United States v. Reliable Transfer Co.*, 421 U.S. 397, 401 n.2 (1975), and the government falls far short of making "a very obvious and exceptional showing of error." *Berenyi*, 385 U.S. at 635. In fact, as explained *infra*, the court of appeals conducted a careful and thorough review of the evidentiary record in concluding that the government and CalFed manifested a mutual intention to contract. That the government interprets the evidence differently can hardly justify disturbing the considered judgment of the

two lower courts that have reviewed the documents in question and reached identical conclusions.

II. The Decision Below Rests On A Straightforward Application Of *Winstar* And Is Consistent With Settled Principles Of Contract And Administrative Law

1. The government does not claim that the decision below conflicts with *Winstar*. Instead, the government devotes its energies to attempting to distinguish *Winstar*, in which this Court recognized that the government's goodwill promises induced numerous acquisitions of failing thrifts and constituted binding contracts. The basis for the government's purported distinction is the fact that the transactions at issue in *Winstar* involved Assistance Agreements that included integration clauses, whereas the Brentwood and Family transactions did not. Pet. 19. The absence of an Assistance Agreement also serves as the government's sole basis for distinguishing the Brentwood and Family transactions from the Southeast transaction, which served as the model for the subsequent Brentwood and Family transactions, and which the government concedes resulted in a contract.

As the lower courts correctly recognized, the absence of an Assistance Agreement containing an integration clause is not a material failing where, as here, there is a record of contemporaneous documents evidencing a mutual intent to contract. In its *Winstar* ruling, the Federal Circuit held that "all of the contemporaneous documents"—including, as here, FHLBB resolutions and correspondence between the Bank Board and acquiring institutions—established that the government had entered into goodwill contracts. 64 F.3d at 1540-44. This Court agreed that "the realities of the transaction" demonstrated that the contemporaneous documents were "contractual commitments, not mere statements of policy." 518 U.S. at 863.

The courts below faithfully applied the teaching of *Winstar* in focusing on "the realities of the transaction" and scrutinizing the contemporaneous documents surrounding each acquisition. Both lower courts analyzed each element of contract formation—offer, acceptance, and consideration—and determined, based on the undisputed facts and a careful comparison between the documentary evidence in this case and the original *Winstar* cases, that the government entered into binding contracts with CalFed.

The Federal Circuit agreed with the trial court that "'the factual record[ ] . . . show[s] intent to contract with the government for specified treatment of goodwill, and documents such as correspondence, memoranda and [FHLBB] resolutions confirm that intent.'" 01-592 Pet. App. 6a (quoting *id.* at 87a). The court of appeals stated that, "[b]ased on all of the contemporaneous documents in each of the three transactions," it had "no doubt that both the government and Cal Fed provided consideration for the agreements," and that "the FHLBB and the FSLIC were contractually bound to recognize the supervisory goodwill and the amortization periods reflected in the forbearance letters." *Id.* Accordingly, the court properly concluded that "[j]ust as in [*Winstar*], all of the necessary elements of contract formation are present here, and the parties are bound by the terms of that contract." *Id.*

The conclusion of both lower courts that goodwill contracts were formed is plainly correct. In each of the three transactions, CalFed made an offer to contract with the government, promising to acquire one or more failing thrifts in exchange for the right to include supervisory goodwill in calculating its regulatory capital. *See* A5002171-73, A5002174-83 (Southeast offer); A5002254-64, A5002329-31 (Brentwood offer); A5002335-46, A5002557 (Family offer). The government accepted each of these offers. *See* A5002162 (acceptance of Southeast offer by FHLBB resolution);

A5002319-24 (acceptance of Brentwood offer by FHLBB resolution and forbearance letter); A5002548-61 (acceptance of Family offer by FHLBB resolution and forbearance letter). And each side provided consideration: CalFed assumed the assets and liabilities of the acquiring institutions (which converted the government's obligations into obligations of CalFed), whereas the government pledged favorable regulatory treatment (and in the case of Southeast, cash assistance).

The government concedes that a contract was formed in the Southeast transaction, Pet. 4, and the *sole* difference between that transaction and the Brentwood and Family transactions is the existence of an Assistance Agreement that happened to include an integration clause. But the undisputed, contemporaneous evidence established that the regulators did not view the presence or absence of an Assistance Agreement as having any bearing on the government's obligations. Assistance Agreements were included only in transactions that involved substantial cash payments by the government, and were never intended to distinguish between contractual and regulatory actions. As D. James Croft, the government's senior regulator at the time, who was ultimately responsible for approving all three transactions at issue, has averred: "An acquiring institution, such as CalFed, would have had the same level of assurance as to the treatment of goodwill in both types of transactions, and the FHLBB certainly did not draw a distinction nor intend that acquiring institutions draw any distinctions as to the treatment of goodwill between assisted and unassisted transactions." A5002914-15; *see also id.* (according to Dr. Croft, Assistance Agreements "had no effect on the nature or extent to which the FHLBB believed itself bound by its agreement").

Moreover, the government's assertion that "a separate contract" containing an integration clause "was necessary to convert regulatory documents into contractual undertakings" (Pet. 20) defies black-letter contract

law, for "it is well-settled law that several writings executed between the same parties . . . may be read together as forming parts of one transaction." *Bailey v. Railroad Co.*, 84 U.S. 96, 108 (1872). *See also Ryan v. United States*, 136 U.S. 68, 83 (1890) ("a complete contract . . . may be gathered from letters, writings and telegrams between the parties"); 1 A. Corbin, *Corbin on Contracts* § 2.10 at 165, 171 (1993); I E. Farnsworth, *Farnsworth on Contracts* § 3.3 at 187 (1998). Thus, contracts need not have an integration clause to be binding (or even integrated), regardless of how many documents are involved. *Restatement (Second) of Contracts* § 209 & cmt. *b* (1983); 3 A. Corbin, *Corbin on Contracts* § 573 at 359 n.3 (1960); *Steinke v. Sungard Fin. Sys., Inc.*, 121 F.3d 763, 771 n.5 (1st Cir. 1997).[4]

The government's argument ultimately amounts to a claim that, in determining whether a contract existed, the court below gave inadequate weight to the absence of an Assistance Agreement containing an integration clause. Pet. 22-23. But even were this the case (and it is not), a miscalculation in weighing the evidence hardly constitutes legal error meriting this Court's review.

2. The government renews its contention, rejected once already by this Court in *Winstar*, that the lower court confused regulatory action with contractual undertakings. Pet. 14-15. This theme permeates the govern-

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[4] The government's reliance on *Charter Federal Savings Bank v. OTS*, 976 F.2d 203 (4th Cir. 1992), for the proposition that "regulatory" documents cannot manifest the government's intent to form a contract (Pet. 23 n.3), is misplaced. The *Charter* court acknowledged that the forbearance letter at issue "may constitute an express agreement, [but] its terms have expired and it is now moot." 976 F.2d at 211 n.11. Moreover, the *Charter* court based its decision on the government's broad reading of the "unmistakability" doctrine, *id.* at 212, a reading that was rejected by this Court in *Winstar*.

ment's petition. In the government's view, the lower court's misreading of regulatory approvals as contractual commitments "conflicts with long-standing principles of administrative law" and "threaten[s] to replace ordinary review of agency action under the Administrative Procedure Act with entirely different standards applicable to contractual commitments." Pet. 24, 27.

The government's attempt to distinguish between the FHLBB's and FSLIC's "contractual" undertakings and their "regulatory" undertakings is nothing less than an attempt to reargue *Winstar*, where the Court held that "[t]he inescapable conclusion . . . is that the Government's 'regulatory' and 'nonregulatory' capacities were fused in the instances under consideration." 518 U.S. at 893-94. Indeed, the Court dismissed as "fundamentally implausible" the government's theory that goodwill promises were simply matters of regulatory grace, and noted that the government was protecting its own financial interests by "convert[ing] some of its financial insurance obligations into responsibilities of private entrepreneurs." *Id.* at 862-63, 894. *Winstar* thus makes clear that the government acted as both a regulator *and* a contractor in making the goodwill promises, and it is liable to the injured parties for breaching those contractual commitments.[5]

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[5] Although the government characterizes the decision below as "deeply troubling" and warns of dire consequences for administrative and contract law should the ruling stand, Pet. 27, its ostensible concern is undercut by its decision to file only a conditional cross-petition. In any event, the Federal Circuit's post-*Winstar* decisions amply demonstrate that, contrary to the government's unfounded concerns, the lower courts have declined to read *Winstar* as authorizing a departure from established law. *See, e.g., Cienega Gardens v. United States*, 162 F.3d 1123, *superseded by* 194 F.3d 1231 (Fed. Cir. 1998). Tellingly, the government's conditional cross-petition fails to cite a single case supporting its fears that contract actions would operate to replace review of

3. The government also argues that the decision below is inconsistent with the principle set forth in *National Railroad Passenger Corp. v. Atchison, Topeka & Santa Fe Railway Co.*, 470 U.S. 451, 466-67 (1985), that "absent 'an adequate expression of an actual intent' of the State to bind itself, this Court simply will not lightly construe that which is undoubtedly a scheme of public regulation to be, in addition, a private contract to which the State is a party." The government claims the lower courts erred because the FHLBB and the FSLIC did not provide an "adequate expression" of the government's intent to be bound. Pet. 25-26.

This argument is a transparent attempt to revive the "unmistakability" doctrine the government unsuccessfully urged upon this Court in *Winstar*. In *Winstar*, the government, as here, argued that the thrifts needed to show that the government had made a clear and unequivocal statement of intent to be bound before it could be deemed to have entered into a contract. Specifically, the government contended that "contracts that limit the government's future exercises of regulatory authority . . . will be recognized only rarely, and then only when the limitation on future regulatory authority is expressed in unmistakable terms." 518 U.S. at 871 (quoting Brief for United States at 16).

The plurality opinion rejected the argument, explaining that "[s]ince the facts of the present case demonstrate that the Government may wish to further its regulatory goals through contract, we are unwilling to adopt any rule of construction that would weaken the Government's capacity to do business by converting every contract it makes into an arena for unmistakability litigation." *Id.* at 886. As Justice Souter explained for the plurality, there was "no need for an unmistakably

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agency actions that should properly proceed under the Administrative Procedure Act.

clear 'second promise' not to change the capital requirements," adding that "it is sufficient that the Government undertook an obligation that it subsequently found itself unable to perform." *Id.* at 887. While Justice Scalia's concurring opinion did not reject the applicability of the unmistakability doctrine *per se*, he declared that "the doctrine has little if any independent legal force beyond what would be dictated by normal principles of contract interpretation." *Id.* at 920 (Scalia, J., concurring in judgment). Significantly, the government does not maintain that application of these "normal principles of contract interpretation" commands a result different than that reached by the two lower courts.

In fact, the government's position is quite to the contrary: It insists that it is entitled to special rules when contracting. But its plea conflicts with this Court's recognition that "[w]hen the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals." *Mobil Oil Exploration & Producing Southeast, Inc. v. United States*, 530 U.S. 604, 607 (2000) (quoting *Winstar*, 518 U.S. at 895). The courts below did not err by refusing to create a special rule for the government. Rather, they faithfully applied *Winstar* in examining the "the realities of the transaction," 518 U.S. at 863, and concluding that the documentary record evidenced the government's intent to be bound. The government has put forth no persuasive reason for this Court to revisit that case-specific determination.[6]

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6 Unlike the government's conditional cross-petition, CalFed's petition (in No. 01-592) presents substantial questions regarding the appropriate remedies for the government's breach of *Winstar*-type contracts—questions that may affect more than 100 pending cases and warrant this Court's review as a consequence of the court of appeals' failure to

CONCLUSION

The conditional cross-petition petition for a writ of certiorari should be denied.

Respectfully submitted.

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adhere to well-established *legal* principles governing contract remedies. The government asserts, however, that "[i]f this Court decides to address the damages issues raised by [CalFed], it should not do so without considering the antecedent liability issue raised herein." Pet. 15. Contrary to the government's suggestion, resolution of those remedial issues would in no way be advanced by a predicate determination that the government had in fact entered into goodwill contracts with CalFed. The government has *conceded* that a contract was formed in the Southeast transaction, and thus the remedial issues would remain open even if this Court were somehow to reverse the liability determinations as to the Brentwood and Family transactions. Thus, if the Court grants CalFed's petition (as we respectfully submit it should), it should deny the government's conditional cross-petition because, as in *Winstar*, there is no reason for the Court to revisit determinations as to contractual intent in which both lower courts concurred, and that, in any event, are correct.